Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

OFFICER TYRONE TATE,

Petitioner,

v.

MICHAEL KOPEC,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This case presents an application of this Court's two-pronged qualified immunity test, as set out in *Saucier v. Katz*, 533 U.S. 191, 121 S. Ct. 2151 (2001) and as further developed in *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508 (2002), in the context of an excessive force claim alleging a failure to loosen tight handcuffs. The questions which this case presents are:

1) Whether the Court properly found that it was clearly established that the Fourth Amendment applied to the use of tight handcuffs during an arrest simply because the Fourth Amendment has been held to apply, in general, to the manner in which arrests are made.

2) Whether this Court should resolve the split in the Federal Circuit Courts of Appeals on the issue of whether an excessive force claim can arise from the failure to loosen handcuffs and, if so, whether any additional factor or element must be shown to substantiate the claim, for purposes of the first prong of the qualified immunity test.

PARTIES TO THE PROCEEDING

The parties to this proceeding in the Third Circuit Court of Appeals were the plaintiff, Michael Kopec, and defendant, Officer Tyrone Tate. The Township of Whitemarsh was a defendant in the district court. Summary judgment was granted as to the township, which the plaintiff did not appeal.

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OPINIONS BELOW

Petitioner seeks review of the order and opinion of the United States Court of Appeals for the Third Circuit, filed on March 17, 2004. The opinion of the Court of Appeals in this case appears at 361 F.3d 772. (App. A) The unreported memorandum opinion and order of the district court, dated October 16, 2002, is set forth as Appendix B. On April 20, 2004, the Court of Appeals denied petitioner's request for rehearing. (App. C)

STATEMENT OF JURISDICTION

This Honorable Supreme Court has jurisdiction of the instant petition pursuant to 28 U.S.C. § 1254(1). (App. C)

The Court of Appeals had jurisdiction of this matter pursuant to 28 U.S.C. § 1291. The District Court had jurisdiction of it action pursuant to 28 U.S.C. §§ 1331 and 1343 and the Federal Civil Rights Act, 42 U.S.C. § 1983.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

FACTS RELEVANT TO THE ISSUES SUBMITTED FOR REVIEW

On February 3, 2000, the plaintiff Michael Kopec and his then-girlfriend, Pamela Smith, were at her apartment when they decided to venture onto a frozen pond located in the middle of the apartment complex, even though the pond was off-limits and surrounded by a fence. The plaintiff jumped the fence to get onto the pond, and Ms. Smith squeezed through a fence opening. Once they got onto the pond, they began to slide and horse around on the ice.

Office Tyrone Tate of the Whitemarsh Township Police Department arrived on the scene approximately 30-45 minutes later. He had received an anonymous call at 11:20 p.m. indicating that two people were walking on the private lake. Officer Tate asked the plaintiff and Ms. Smith to leave the fenced-in area, which they did.

There was no dispute that Michael Kopec and Pamela Smith were trespassing on this property. In order for Officer Tate to fill out the appropriate paperwork on the call he

received, he required the plaintiff's and Ms. Smith's names and addresses. The plaintiff later admitted that Officer Tate was probably not going to charge them with criminal trespass and probably would have let him and Ms. Smith go on their way, but the plaintiff nonetheless repeatedly refused to give Officer Tate his name.

Officer Tate indicated to the plaintiff that he was going to arrest him, at which point the plaintiff replied, "I guess you got to do what you got to do . . ." The plaintiff put both hands forward and Officer Tate handcuffed him.

The plaintiff has alleged that he asked that the handcuffs be loosened because they were tight. However, at this point in the encounter, the plaintiff did not tell Officer Tate that he was in pain, instead, he taunted Officer Tate by rhetorically asking him if putting handcuffs on tightly was what he did to arrestees who did not give their names. Moreover, at this time Officer Tate was involved in legitimate police business, as he was continuing his investigation by questioning Ms. Smith.

Officer Tate testified that, based on his experience and given the lack of urgency in the plaintiff's voice, he initially did not believe that the plaintiff was in pain, but believed that any discomfort the plaintiff felt was based on the low temperature.

Q: The first time he complained you said you ignored him. Why is that?

A: Not that I ignored him. I mean I heard him say it. I didn't know if he was serious or not serious. If he was serious, I knew he would have told me in a

> stronger way and it's just a feeling out there that this guy is in handcuffs, is that because his hands were cold, because his hands were frozen like everyone else's were.

Immediately after Ms. Smith gave Officer Tate the plaintiff's full name, the plaintiff screamed and fell to his knees in the snow. At that point, Officer Tate was first on notice that the handcuffs might be causing pain, but he believed that the plaintiff might not actually be hurt, but merely acting. He nevertheless checked them.

> Q: How did you know he was on his knees?
>
> A: I heard him, you know, he screamed out, these hurt, these hurt, something to that effect. Then I remember turning and going to him and thinking they either hurt or he's acting. I didn't know which, you know, and it was just better for me to check.
>
> * * *
>
> Q: Did you make any observations that would indicate to you that he was acting?
>
> A: Well, he could have been. It was one of two things, either they were irritating him or he was acting. I didn't know which, so I wanted to be safe and see if they were irritating him, which is why I went to check him.

In all caution, the handcuffs were loosened. "[I]t wouldn't have done any good if I checked it and didn't agree with him or not. He say they were troubling him, so it was my opinion to take them off and redo them."

The entire encounter lasted between four and ten minutes. After the cuffs were removed, the plaintiff was placed in the police car and taken to the Whitemarsh Township Police Station. The plaintiff was arrested and issued a citation for trespassing, reduced to disorderly conduct.

The plaintiff subsequently filed this suit, alleging that Officer Tate and Whitemarsh Township violated his constitutional rights. The District Court had jurisdiction over the action pursuant to 28 U.S.C. §§ 1331 and 1343 and the Federal Civil Rights Act, 42 U.S.C. § 1983. The complaint alleged that Officer Tate used excessive force against the plaintiff by failing to loosen the handcuffs during his arrest. The complaint also alleged that the arrest and tight handcuffs were retaliation for the plaintiff not giving Officer Tate his name.

The defendants filed a motion for summary judgment on July 16, 2002. The motion argued that Officer Tate was entitled to qualified immunity, that there was no constitutional violation supporting the retaliation claim, and that Officer Tate was entitled to the immunity of the Pennsylvania Tort Claims Act. Moreover, the claims against the Township should be dismissed because the plaintiff could not show any involvement of the Township regarding, policies, training or otherwise. The plaintiff did not contest the dismissal of the claims against the municipality.

Judge J. Curtis Joyner of the District Court for the Eastern District issued his decision granting summary judgment to the defendants on October 22, 2002. (App. B, 31a-38a) In his Memorandum and Order, Judge Joyner found that Officer Tate was entitled to qualified immunity because, under the particular facts of this case, the actions of the defendant were not such that a reasonable officer would find

them unlawful. (35a-36a) Further, the plaintiff's claim for retaliation was also found to fall under qualified immunity, because the plaintiff failed to present any evidence to show that the defendant could have believed that he was acting unlawfully. (37a)[1]

The plaintiff appealed to the Third Circuit Court of Appeals. The appeal was heard by Judges Theodore McKee, D. Brooks Smith, and Senior Judge Morton Greenberg. After briefing and oral argument, the Court published its opinion on March 17, 2004. Over the dissent of Judge Smith, the Court reversed the decision of the district court, denied qualified immunity, and remanded the case to the district court. (App. A, 1a-30a)

The majority first held that the fact alleged by the plaintiff were sufficient to establish a violation of a constitutional right, because, in the majority's view, the officer was not in a dangerous situation.

> In reaching our conclusion that Kopec has asserted facts that if proven would establish that there had been a violation of his constitutional rights, we point out that Officer Tate faced rather benign circumstances that hardly justified his failure to respond more promptly to Kopec's entreaties, at least to the extent to ascertain if the handcuffs were too tight. Officer Tate was not, after all, in the midst of a dangerous situation involving a serious crime or armed criminals. Accordingly, this opinion should not be overread as we do not intend to open the floodgates to a torrent of handcuff claims. Thus, if Officer Tate had been

1. The state law claims were also dismissed.

> engaged in apprehending other persons or other imperative matters when Kopec asked him to loosen the handcuffs our result might have been different.

(10a) There was no evidence, however, that Officer Tate had determined that the plaintiff and Ms. Smith were, in fact, unarmed, or that no crime more serious than trespassing had occurred.

Further, the majority concluded that the right was clearly established, because the Fourth Amendment had previously been held to extend to the manner in which an arrest was made, and handcuffing is part of the manner in which an arrest is made.

The Court stated:

> With respect to the second inquiry on qualified immunity, it cannot be said as a matter of law that a reasonable officer would not have known that this conduct was in violation of the Fourth Amendment even though it appears that neither the Supreme Court nor this court has ruled that a police officer may be using constitutionally excessive force in tightening handcuffs. The Court of Appeals for the Ninth Circuit has noted that at least as early as 1985 the use of excessive force by officers in effectuating an arrest was clearly proscribed by the Fourth Amendment as it held . . . that "the Fourth Amendment governs not only whether a person or thing is subject to a 'seizure,' but also 'the manner in which a seizure is conducted.'"

(10a-11a)

Judge Smith filed a dissenting opinion. In his opinion, he first recognized that the plaintiff's initial complaints to Officer Tate failed to indicate that he was in pain.

> Kopec's initial statement to Officer Tate did not communicate anything more than a complaint about tightness. From the perspective of a reasonable officer, it would not have been unusual for an arrestee to initially request that the cuffs be adjusted or loosened. Handcuffs, by their very nature, are restrictive, uncomfortable, and unfamiliar to most individuals. Although Kopec affirmed during his deposition that he experienced a loss of feeling within about ten seconds of being cuffed, careful reading of his testimony reveals that he did not express this to Officer Tate.
>
> Kopec's second request to have the cuffs removed was also devoid of any suggestion that the cuffs were too restrictive or were causing him pain . . .

(21a-22a) As soon as Officer Tate was aware of the complaints of pain from the handcuffing, he moved a reasonable time thereafter to ameliorate the situation.

> Viewed from the perspective of a reasonable officer, Tate's conduct was not, in my view, unreasonable. He was constitutionally permitted to apply some force in arresting Kopec. After receiving notice that the force applied by the cuffs may have been excessive, Officer Tate responded reasonably.

* * *

> In my view, the totality of the circumstances considered by the majority has not adequately taken into account the fact that there was only one officer at the scene, and that he was occupied with another task that was a legitimate police duty.

(22a-23a) In his opinion, Judge Smith also disagreed with the manner in which the majority concluded that the law was clearly established, because the majority applied an expansive and general principle. In Judge Smith's view, the majority's analysis is flawed, "because it fails to determine what the contours of the right were, and neglects to recognize that the law did not provide Officer Tate with fair warning that he was required to respond more promptly than he did to Kopec's complaint that the handcuffs were too tight." (14a-15a) He stated further:

> Although my colleagues have employed the two-part test set forth in *Saucier*, I do not believe that their reliance on only the Fourth Amendment's broad, general proscription against the use of excessive force is sufficient because it fails to take into account the situation confronting Officer Tate.
>
> Supreme Court qualified immunity jurisprudence has long required that courts undertake a particularized inquiry. In the seminal case of *Anderson*[*v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034 (1987)], the Supreme Court observed that the determination of whether there is qualified immunity depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. . . . The Court recognized that if the test were applied at a general level, as I believe

> the majority does here, then "plaintiffs" would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability . . .

(25a-26a)

The defendant filed a timely petition for rehearing. On April 20, 2004, the Court issued its order denying the petition. This petition follows.

REASONS FOR GRANTING THE PETITION

Rule 10 of the Supreme Court Rules address the type of compelling situations this Court favors when exercising its prerogative in issuing a writ of certiorari. They include when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," or when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." SUP. CT. R. 10(a), (c).

Hope v. Pelzer, 536 U.S. 730, 122 S. Ct. 2508 (2002) established that there need not be a case directly on point for the law to be considered "established" for qualified immunity purposes. This case examines the opposite end of the question, and asks whether general and non-specific principles of law may be relied upon to "clearly establish" the law.

In addition, this case also calls for this Court to resolve the split in the Circuits as to when a claim of the use of excessive force can stem from the failure to loosen tight handcuffs, and whether any additional factors or elements are required to state such a claim.

A. Whether A Specific Constitutional Right Can Be "Clearly Established" By Virtue Of Broadly Established Principles Is An Important Question Requiring This Court's Attention.

The writ of certiorari should be granted by this Court because it squarely presents an important issue of federal law with significant practical consequences.

The Third Circuit Court of Appeals in this case concluded that the failure to immediately loosen the allegedly tight handcuffs was a violation of a constitutional right and that this right was clearly established. This was clearly established in the Court's view, not because there was any precedent establishing that an excessive force claim can arise from the failure to loosen tight handcuffs, but because it is clearly established that the manner in which an arrest is made is subject to the Fourth Amendment. Thus, under this reasoning, the Fourth Amendment effectively applies to any claim which in any way involves the manner in which an arrest is made, regardless of whether there is any case law or other decision addressing the specific facts at issue.

Government officials exercising discretionary functions have qualified immunity from suits seeking damages under [42 U.S.C.] § 1983 "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982).

The second prong of the qualified immunity test asks whether the right alleged to have been violated was clearly established at the time of the incident in question. This Court, in *Anderson v. Creighton*, 483 U.S. 635, 107

S. Ct. 3034 (1987), and *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151 (2001), established that to be "clearly established," the right must be established more then just as a general proposition.

This Court established that is not enough that the right alleged to be violated was established as a general proposition. "[T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violated that right." *Saucier*, 533 U.S. at 202, 2156, *quoting Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039 (1987). In order for the right allegedly violated to have been clearly established, the contours of that constitutional right must be "sufficiently clear that a reasonable officer would understand that what he is doing violates that right." *Hope*, 536 U.S. at 739, 122 S. Ct. at 2515 *quoting Mitchell v. Forsyth*, 472 U.S. 511, 535, 105 S. Ct. 2806, 2820 (1985). The unlawfulness must be apparent in light of the then existing law. *Id.*

"This inquiry, it is vital to note, must be undertaken ***in light of the specific context of the case, not as a broad general proposition***; and it too serves to advance understanding of the law and to allow officers to avoid the burden of trial if qualified immunity is applicable." *Saucier* 533 U.S. at 201, 2156, (emphasis supplied.)

If the law does not put the officer on notice that his actions would be clearly unlawful, qualified immunity must be granted, because qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096 (1986).

In *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508 (2002), this Court firmly established that public officials can be on notice that their conduct violates clearly established law, for purposes of the second prong of the qualified immunity test, even in the absence of case law which is fundamentally or materially similar to the facts at issue, so long the decisions relied upon give reasonable or fair warning that the conduct violates constitutional rights.

This case picks up where *Hope* left off by asking how specific must those decisions be in order for there to be reasonable or fair warning. In other words, recognizing that *Hope* does not require an absolute specificity or identity between the actions of the official and the previous decisions relied upon for the law to be clearly established, at what point are the established decisions too broad and disconnected from the official's specific acts under review to give the official fair warning, thus mandating that qualified immunity be granted.

This is an important issue. *Hope* showed the district and circuit courts that the second prong of the test required more than a limited search for binding precedent on the exact or similar factual situation. With the decision in this case, however, the Third Circuit has seemingly taken *Hope* to an unnatural extreme. Not only did the Court not point to any decision directly on point, it grounded its conclusion that the law was clearly established simply on the fact that the manner in which an arrest is made is subject to the strictures of the Fourth Amendment.

In *Hope*, this Court discussed how it can be established that the "unlawfulness" is apparent, and this Court accepted the requirement of "fair notice" familiar under § 1983's

criminal analogue, 18 U.S.C. § 242. *Hope*, 536 U.S. at 739, 2515. The *Hope* Court confirmed that an officer sued under § 1983 has the identical right to fair notice that the alleged conduct is unlawful as a defendant charged with violation of § 242. *Id. United States v. Lanier*, 520 U.S. 259, 117 S. Ct. 1219 (1997) detailed the three aspects of the fair notice requirement: First, the vagueness doctrine, which bars the enforcement of a criminal statute which describes the prohibited activities in terms such that a reasonable person must guess as to what is precluded; second, the canon of strict construction, which ensures that ambiguity is resolved in favor of permitting prosecution for only conduct which is clearly covered by the statute; and finally, the due process requirement, which bars courts from applying novel constructions of criminal statutes to conduct which neither the statutes themselves or prior decisions have disclosed as being precluded. *Id.* at 266-267, 1225.

The fair warning requirements mandate that § 242 applies (and, by extension, qualified immunity in a § 1983 action is denied) only when an unclouded view of the law includes the acts alleged as clearly within that area proscribed by the Constitution. *Lanier* also established that, for purposes of § 242 liability, in order for an officer to have fair warning, there is no requirement that there be case law that is "fundamentally similar" in nature to that under review. *Id.* at 269, 1227.

This Court applied those concepts developed in *Lanier* to the civil law context under § 1983 in *Hope*, and concluded that so long as "the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights,"

then that law will be considered to be "clearly established." *Hope*, 536 U.S. at 740, 2515. The *Lanier* Court affirmed that:

> . . . general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though "the very action in question has not previously been held unlawful"

Lanier, 520 U.S. at 271, 1227, quoting *Anderson*. Thus, *Hope* established that "fundamentally similar" case law is not required, but general statement of the law are sufficient to "clearly establish" a constitutional right. But there is a tension, because *Anderson* and *Saucier* established that the inquiry must be made in the specific context of the case. The issue in this case is in some ways the compliment of *Hope*, because it asks whether the general statement of law relied upon to declare a right firmly established can be so general as to implicate the fair notice requirements.

The parties in this case agreed that there is no law on point from this Court or the Third Circuit Court of Appeals on the issue of whether a Fourth Amendment claim can stem from the failure to loosen tight handcuffs. Indeed, in a recent decision, albeit unpublished, the Third Circuit upheld a grant of qualified immunity in a handcuffing case, and noted that the law in this area was not established even in a general sense:

> In its analysis of the second step, i.e., whether the constitutional right was clearly established, the district court fully surveyed the state of the law

> and determined that, at the time of the incident, the question of whether tight handcuffing constitutes a violation of Fourth Amendment rights against excessive force was not established even in a general sense. Therefore, it clearly was not established in the particularized sense required for qualified immunity.
>
> We find no error in the district court's *Saucier* analysis. Quite frankly, if the various circuit courts of appeals and the district courts disagree on the question, we can hardly fault Officer Rogge, especially since it is apparent that he was dealing with a thoroughly uncooperative person who had been arrested for drunk driving.

Istvanik v. Rogge, 50 Fed. Appx. 533, 537, 2002 U.S. App. LEXIS 22436, **7-8 (3d Cir. 2002) (unpub.)[2]. However, rather than examining the issue in the particularized, relevant sense, and determining whether fair notice was given on the issue of whether the failure to loosen handcuffs amounts to excessive force, the Third Circuit majority concluded that since the Fourth Amendment applies to preclude excessive force in the manner in which an arrest is made, a Fourth Amendment claim stemming from tight handcuffing during an arrest is therefore clearly established.

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2. Judge McKee, part of the majority in this case, authored the *Istvanik* opinion. Given that the case law did not appreciably change between the issuance of the *Istvanik* memorandum and the opinion in this case, this apparent inconsistency is peculiar.

The majority's reasoning in this case is very similar to reasoning previously rejected by this Court.

In *Wilson v. Layne*, 526 U.S. 603, 119 S. Ct. 1692 (1999), this Court was tasked with determining whether the presence of media personnel during the execution of warrant, as a violation of the Fourth Amendment, was clearly established, and stated, "[i]t could plausibly be asserted that any violation of the Fourth Amendment is 'clearly established,' since it is clearly established that the protections of the Fourth Amendment apply to the actions of police." *Id.* at 615, 1699. This level of generality was rejected as being too insufficiently precise. "However, as we explained in *Anderson*, the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Id.*

This Court in *Wilson* cautioned that police officers are not expected nor required to predict how the law will evolve.

> Given such an undeveloped state of the law, the officers in this case, the officers in this case cannot have been "expected to predict the future course of constitutional law." . . . If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.

Id. at 617-18, 1700-01. Judge Smith's dissent in this case shows that it is reasonable for an experienced, learned jurist to conclude that no constitutional violation occurred on the facts of this case. If three judges cannot agree, after the fact,

whether Officer Tate's actions were unconstitutional, it defies belief to say that the unlawfulness of his acts should have been clearly apparent to him, in the heat of the moment.[3]

This case begins were *Hope* ends, by asking whether an officer is given fair notice and whether the law is clearly established for purposes of qualified immunity when his action has been found to be unlawful only in the most general fashion and by asking when the issue is defined so broadly as to eliminate fair warning. Because of the important and practical issues raised by the standards employed by and the analysis of the Court of Appeals in this case, this Honorable Court is respectfully requested to issue a writ of certiorari.

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3. The majority's reasoning is also clearly contrary to *Saucier*, because it fails to distinguish between the two prongs of the qualified immunity test. Under the standard employed by the Third Circuit, the two prongs of the qualified immunity test effectively collapse into a single question when the issue is in any way connected with an arrest—namely whether the facts could establish a violation.

Prior to *Saucier*, of course, the objective reasonableness test was being fused with the evaluation to determine whether qualified immunity should be granted. The issue before the *Saucier* Court was whether it was proper to collapse the two questions in the qualified immunity test. The Ninth Circuit had held that the *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865 (1985) "objective reasonableness" test was co-extensive with the second prong of the qualified immunity test, inquiring whether a reasonable officer could believe that his conduct was lawful. The qualified immunity test collapsed into one question, namely whether the facts could establish a violation.

In *Saucier*, this Court, of course, insisted that the two prongs are separate and cannot be collapsed into a single question. *Saucier*, at 200, 2155.

B. This Court Should Resolve The Split In The Circuits Regarding Whether An Excessive Force Claim Can Stem From The Failure To Loosen Tight Handcuffs.

This Court should also grant certiorari in this case because of a split in the Federal Circuit Courts of Appeals on the question of whether and to what extent an excessive force claim can stem from the alleged failure of an officer to loosen tight handcuffs. The cases decided by the circuit courts have shown a disagreement on whether such a claim is viable, and, if so, whether any additional factors—such as the presence of an injury or the extent of an officer's knowledge—are necessary to sustain the claim.

The qualified immunity test first asks whether a constitutional right has been violated on the facts alleged. *Saucier*, 533 U.S. at 201, 2156. If the failure to loosen allegedly tight handcuffs, given all the facts of the case, does not amount to a violation of a constitutional right, then qualified immunity must be granted.

A claim of excessive force under the Fourth Amendment must be analyzed by the objective reasonableness of the action. The test asks whether, under the totality of the circumstances, "the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivations." *Graham v. Connor*, 490 U.S. 386, 397, 109 S. Ct. 1865, 1872 (1985). Furthermore, the facts of the case must be viewed from the point of view of the officer on the scene, and not retrospectively:

> the "reasonableness" of a particular use of force must be judged from the perspective of a

> reasonable officer on the scene, rather than with the 20/20 vision of hind-sight . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

Id.

However, the Courts of Appeals wildly diverge in their opinions as to when and if the failure of an officer to loosen handcuffs can lead to a viable excessive force claim. This Court's review is essential so as to keep the federal law uniform among and between the Circuits, and to resolve the split that has arisen regarding these constitutional principles.

In this case, the majority cited to the Ninth Circuit's case of *Palmer v. Sanderson*, 9 F.3d 1433 (9th Cir. 1993), for the contention that, in the context of loosening tight handcuffs, "no reasonable officer would believe that the abusive application of handcuffs was constitutional." *Id.* at 2436. The Ninth Circuit Court of Appeals, in fact, represents one extreme—flatly holding that an excessive force claim can result from the use of tight handcuffs. *LaLonde v. County of Riverside*, 204 F.3d 947, 960 (9th Cir., 2000) ("A series of Ninth Circuit cases has held that tight handcuffing can constitute excessive force.")

However, other circuit courts have not taken the same blanket approach as the Ninth Circuit. Most notably, the Tenth Circuit Court of Appeals, in *Hannula v. City of Lakewood*, 907 F.2d 129 (10th Cir. 1990), represents the opposite end of

the spectrum on the specific question at issue here, stated that "while loosening tight handcuffs may be the most compassionate action, the failure to do so does not rise to a clearly established constitutional violation." *Id.* at 132.

Between these two extremes, the various circuit courts are at odds in determining what is sufficient to establish such a claim, and what additional allegations, if any, are necessary to sustain the claim.

The Third Circuit's position, based on this case, appears to be that no requirement is needed to present a viable claim, except if the situation is "dangerous," or the officer is involved in other "imperative" matters (which necessarily does not include interviewing another suspect.) (10a) This would seem to be as broad as the Ninth Circuit's take on the issue.

The Fourth Circuit would not permit the claim to proceed only on a complaint of pain. In *Carter v. Morris*, 164 F.3d 215 (4th Cir. 1999), the Court stated that the plaintiff's excessive force claim based on tight handcuffing was "so insubstantial that it cannot as a matter of law support her claim under the Fourth Amendment . . . or the Fourteenth." *Id.* at 219 n.3 (internal citations omitted). The Court in *Carter* cited, as support, *Martin v. Gentile*, 849 F.2d 863 (4th Cir. 1988), and *Riley v. Dorton*, 115 F.3d 1159 (4th Cir. 1997). In *Riley*, as in *Carter*, the court took an intermediate position and affirmed the grant of qualified immunity where the painful handcuffing produced no injury. *Riley*, 115 F.3d at 1167.

Likewise, the First Circuit also appears to require, at a minimum, the presence of an injury to sustain the claim.

In *Gonzalez v. Benito*, 1994 U.S. App. LEXIS 25609 (1st Cir. 1994) (unpub.), the court held that "tight handcuffs standing alone are not enough to proceed to trial on a constitutional claim." *Id.* at *4. But, in *Bastien v. Goddard*, 279 F.3d 10, 14-15 (1st Cir. 2003), the court held that there was no requirement that the injury be "serious" in order to proceed, implying that some injury is necessary. *Cf.*, *Pena-Borrero v. Estremeda*, 365 F.3d 7, 12 (1st Cir. 2004) (handcuffing during arrest pursuant to faulty warrant which resulted in exacerbation of pre-existing injury, insufficient to state a claim.)

However, the Fifth Circuit Court of Appeals has granted qualified immunity, even in the presence of pain and some injury. In *Glenn v. City of Tyler*, 242 F.3d 307 (5th Cir. 2001), the Court stated that "handcuffing too tightly, without more, does not constitute excessive force." *Id.* at 314. *See also Wesson v. Oglesby*, 910 F.2d 278, 284 (5th Cir. 1990) (delay in treatment where tight handcuffs caused swollen, bleeding wrists does not establish Eighth Amendment claim.) In *Gold v. City of Miami*, 121 F.3d 1442 (11th Cir. 1997), the Eleventh Circuit Court of Appeals also affirmed the granting of qualified immunity, even though the plaintiff experienced pain and injuries. *Id.* at 1446-47. The Court stated that twenty minutes of pain, and abrasions on the plaintiff's wrists would not "inevitably lead" an officer to conclude that his use force was unlawful. *Id.*

Likewise, the Eighth Circuit requires the presence of severe, permanent injury in order for a claim to be established. The Court in *Crumley v. City of St. Paul*, 324 F.3d 1003, 1008 (8th Cir. 2003), held that excessively tight handcuffing which resulted in an injured, bleeding wrist was insufficient

to state an excessive force claim. *Crumley* relied on *Foster v. Metropolitan Airports Comm'n*, 914 F.2d 1076, 1082 (8th Cir. 1990), where the Court held that "allegations of pain as a result of being handcuffed, without some evidence of more permanent injury, are sufficient to support a claim of excessive force," and rejected the plaintiff's complaint of pain and nerve damage as insufficient to establish the claim.

The Sixth Circuit would permit an excessive force claim stemming from tight handcuffs, but only when the officer had knowledge of the tightness and the arrestee was no threat. In *Walton v. City of Southfield*, 995 F.2d 1331 (6th Cir. 1993), the Court held that an excessive use of force claim could be premised on the officer handcuffing the prisoner if: first, the officer knew the prisoner had an injury; and second, if the officer also believed that the prisoner posed no threat. *Id.* at 1342. In *Neague v. Cynkar*, 258 F.3d 504 (6th Cir. 2001), the Court went further and held that handcuffing incident to a lawful arrest with no accompanying physical injury is insufficient to establish an excessive force claim. *Burchett v. Kiefer*, 310 F.2d 937, 944-45 (6th Cir. 2002) also held that tight handcuffing alone is insufficient to state a claim of excessive force, where the officers loosened the handcuffs a reasonable time after first being notified that they were too tight.

The Eleventh Circuit requires not only a showing of knowledge on the officer's behalf, but also something more than minimal injury. In *Rodriguez v. Farrell*, 280 F.3d 1341 (11th Cir. 2002), after a traffic stop, two police officers arrested the plaintiff pursuant to a valid warrant which, it turned out, was issued for a different individual. In the course of making the arrest, the plaintiff's arm was twisted behind his back and jerked up to his shoulder. *Id.* at 1351.

The plaintiff screamed. Unbeknownst to the arresting officer, the plaintiff had recently undergone significant orthopedic shoulder surgery. *Id.* As a result of the handcuffing, the plaintiff's internal surgical hardware was loosened, and a key bone fragment was displaced. *Id.* Over twenty-five surgeries followed in an attempt to correct the problem, which were ultimately unsuccessful and resulted in the plaintiff's arm being amputated below the elbow. *Id.*

In reversing the district court's denial of summary judgment, the Court first noted that "[p]ainful handcuffing, without more, is not excessive force in cases where the resulting injuries are minimal." *Id.* at 1351, *citing*, *Nolin v. Isbell*, 207 F.3d 1253 (11th Cir. 2000); *Brissett v. Paul*, 141 F.3d 1157 (4th 1998) (table); *Martin v. Gentile*, *supra*; *Silverman v. Ballantine*, 694 F.2d 1091 (7th Cir. 1982).

The Court then recognized that the plaintiff's surgery changed the situation, somewhat, by virtue of the negative consequences. "This case is different from *Nolin* because [plaintiff's] earlier surgery made what otherwise would have been a common non-excessive handcuffing technique (that ordinarily would be painful but cause minimal injury) a maneuver that caused severe injury and tragic results." *Rodriguez*, 280 F.3d at 1351.

This distinction, and the devastating injuries which resulted, was found by the Court to be legally irrelevant for purposes of determining whether excessive force was used:

> [N]o evidence has been presented that [the arresting officer] knew of plaintiff's recent elbow surgery or, more importantly, knew that handcuffing plaintiff would seriously aggravate

> plaintiff's preexisting condition. We do no use hindsight to judge the acts of police officers; we look at what they knew (or reasonably should have known) at the time of the act. What would ordinarily be considered reasonable force does not become excessive force when the force aggravates (however severely) a pre-existing condition the extent of which was unknown to the officer at the time.

Id. at 1351-53 (footnote omitted.)

Rodriguez's reliance on the knowledge of the officer in finding a potential cognizable claim is important, as in those instances where Courts have determined that tight handcuffs can lead to a viable excessive force claim, the officer's knowledge of the condition, and an unreasonable time thereafter to loosen the cuffs, has been cited as important consideration in establishing the presence of the claim, as has the question of whether the plaintiff violated the law or was resisting arrest. *See*, *e.g.*, *Kukla v. Hulm*, 310 F.3d 1046 (8th Cir. 2002) (denied qualified immunity, in part, because plaintiff committed no offense and did not resist); *Bastien*, 279 F.3d at 12-13 (reversing judgment for officer based on tight handcuffing for more than four hours, despite plaintiff's repeated complaints); *Kostrzewa v. City of Troy*, 247 F.3d 633, 639-40 (6th Cir. 2001) (officer documented that he had been able to tighten the cuffs to only the first tooth because the plaintiff had large wrists, yet he ignored plaintiff's persistent complaints that the cuffs were too small and tight until after the plaintiff was booked); *Heitschmidt v. City of Houston*, 161 F.3d 834, 839-40 (5th Cir. 1998) (reversing summary judgment for officers who ignored repeated complaints over a four-hour period and pointing out that the officers had no justification for refusing to adjust the painful

cuffs); *Martin*, 106 F.3d at 1310, 1313 (plaintiff's complaints that his hands were becoming numb and swollen and the officer's failure to adjust the handcuffs were sufficient to state a Fourth Amendment claim); *Alexander v. County of Los Angeles*, 64 F.3d 1315, 1323 (9th Cir. 1995) (officer failed to adjust handcuffs even though plaintiff complained of pain, alerted the officer that his medical condition necessitated adjusting the handcuffs, and the officer noted that the plaintiff's wrists were "mushy" when he applied the cuffs); *Greiner v. City of Champlin*, 27 F.3d 1346 (8th Cir. 1994) (no excessive force claim in violent handcuffing case where plaintiff resisted.). *See, also, Braun v. Baldwin*, 346 F.3d 761, 763 (7th 2003) (affirming summary judgment on excessive force/tight handcuffing case because no indication that "arrest was effected in an unusual or improper manner.")

Judge Smith's conclusion that there was no constitutional violation in this case was reached because Officer Tate had no notice that the cuffs were painfully tight. (22a-23a) The plaintiff in this case requested that the handcuffs be loosened and said they were tight, but it was not until he fell to the ground, groaned, and stated that he could not feel his hands that Officer Tate was on reasonable notice that the handcuffs were causing pain.

The Ninth Circuit's position in *Palmer*—that tight handcuffing can establish an excessive force claim—and Tenth Circuit's in *Hannula*—that not loosening tight handcuffs is not a constitutional violation—represent the two extremes. Other Courts have emphasized notice, injury and the severity of the injury as factors which must present in order for the claim to be cognizable.

Because there is such a fundamental difference of opinion among the various courts on this issue, this Court should grant the writ of certiorari to make the law consistent.

Clearly, this issue has great importance in the resolution of this particular case. If this Court were to conclude, for example, that the Tenth Circuit Court of Appeal's statement in *Hannula* that the failure to loosen handcuffs simply does not rise to the level of a constitutional violation was the correct view, or that the momentary delay in loosening the handcuffs was not objective unreasonable under *Graham*, because of a lack of notice that he was in pain, then Officer Tate's delay in attending to the plaintiff in this case could not establish a violation of the plaintiff's constitutional rights. He would be unquestionably entitled to qualified immunity.

> If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established.

Saucier, 533 U.S. at 201, 2156. However, resolution of this issue has an importance that extends beyond this particular case. This issue is one that is highly contentious, and which appears to be subject to a great deal of litigation. The sheer number of cases which have garnered appellate review and the varied approaches taken by the Courts of Appeals show this to be an issue of wide-ranging applicability. The fact that there are such significantly divergent rulings as to whether a constitutional claim can be based on tight handcuffs, and, if so, whether additional factors such as the

presence of severe injury are necessary to state such a claim, is indicative of the fact that this area of the law has become much too split, necessitating this Court's attention.

CONCLUSION

As such, the petitioner respectfully request this Honorable Court to grant its petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED MARCH 17, 2004

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 02-4188

MICHAEL KOPEC,

Appellant

v.

TYRONE TATE, OFFICER;
TOWNSHIP OF WHITEMARSH

Argued November 6, 2003

BEFORE: MCKEE, SMITH, and GREENBERG, *Circuit Judges*.

(Filed: March 17, 2004)

OPINION OF THE COURT

GREENBERG, *Circuit Judge*.

This matter comes on before this court on an appeal by plaintiff Michael Kopec ("Kopec") from the district court's order entered on October 22, 2002, granting summary judgment in favor of defendant Officer Tyrone Tate ("Officer Tate") in this action principally brought under 42 U.S.C.

§ 1983 ("section 1983"). For the reasons stated herein, we hold, contrary to the district court, that Officer Tate is not entitled to qualified immunity on Kopec's excessive force claim and therefore we will reverse the district court's order granting summary judgment in his favor on that basis.

I. BACKGROUND

In the evening of February 2, 2000, Kopec and his girlfriend, Pamela Smith (whom Kopec later married), trespassed onto the frozen lake at the Sherry Lake Apartment Complex in Conshohocken (Whitemarsh Township), Montgomery County, Pennsylvania.[1] The lake, which was fenced off, was located on the property where Pamela Smith (now Pamela Kopec) rented an apartment. To gain access to the lake Kopec hopped over the fence and his girlfriend squeezed through an opening in it. The two then proceeded to frolic on the ice.[2] Officer Tate, who then arrived in response to an anonymous call, directed them to get off the lake, and the two complied.

Although Officer Tate did not intend to charge them with trespassing, he did seek to record their names, addresses, and phone numbers for his report and he advised Kopec that he needed this information for that purpose. Kopec

1. On this appeal from an order granting summary judgment against him we are stating the facts from Kopec's perspective. At trial the events may appear in a different light.

2. Kopec in his brief indicates that he and his girlfriend "were frolicking on the ice" and thus the characterization of their conduct is his. Brief of Appellant at 4.

nevertheless refused to provide this information, though Officer Tate repeatedly asked for it, and Kopec instructed his girlfriend not to do so either. Officer Tate became annoyed with Kopec and then arrested him for disorderly conduct, and handcuffed him behind his back.

Within about ten seconds of being handcuffed, Kopec began to lose feeling in his right hand and, as a consequence, asked Officer Tate to loosen the handcuffs, but Officer Tate did not do so. Kopec then asked if "this is what he does when people don't give him information." Officer Tate did not answer. A. 30.

Officer Tate took Kopec to his police car several feet away and left him alongside it as he went to interview Pamela Kopec, who was close by. As Officer Tate walked away, Kopec told him the pain was unbearable and begged him to loosen the handcuffs. Again, Officer Tate did not comply with Kopec's request. Kopec began to faint from the pain caused by the handcuffs and then fell to the ground. He asked Officer Tate to remove the handcuffs because he had lost feeling in his right hand. Officer Tate said "I will be there in a minute," and did not go to Kopec immediately. A. 31. Kopec asked him again either to loosen or remove the handcuffs while Kopec was groaning due to excruciating pain. Officer Tate heard Kopec, but took no steps to assist him. According to Kopec, it took Officer Tate about ten minutes from the time he had handcuffed Kopec finally to loosen the handcuffs.[3] Kopec claims to have permanent nerve damage in his right wrist as a result of the handcuffing, for which a hand surgeon treated him for over one year.

3. Officer Tate recalls the period as being between four and eight minutes.

Appendix A

Kopec concedes that he was trespassing in violation of 18 Pa. Cons.Stat. Ann. § 3503(b)(1)(iii) (West Supp.2003) and that Officer Tate lawfully was able to arrest and handcuff him. Nevertheless Kopec subsequently brought this action against Officer Tate, alleging that the officer's acts violated section 1983 and were tortious under Pennsylvania law. On Officer Tate's motion the district court granted summary judgment in his avor on the basis that he had qualified immunity on claims Kopec asserted under section 1983 predicated on the First, Fourth and Fourteenth Amendments and that claims Kopec advanced under the Pennsylvania Tort Claims Act charging intentional, willful misconduct and intentional infliction of emotional distress were barred by the immunity provisions of that act in 42 Pa. Cons.Stat. Ann. §§ 8541 and 8545 (West 1998).[4] Kopec appeals from the district court's order but only with respect to his Fourth Amendment claim.[5]

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4. Kopec also sued the Township of Whitemarsh which obtained a summary judgment on an uncontested motion but Kopec has not appealed from this disposition and thus the township is out of the case.

5. Kopec has waived any challenge to the district court's ruling with regard to his state law claims as in his brief he merely makes passing reference to these claims, stating that "[p]laintiff has also made a state tort claim pertaining to these circumstances" and "Officer Tate's conduct is actionable as a state tort under 42 Pa.C.S.A. § 8542." *See* Brief of Appellant at 9, 11. Kopec's failure sufficiently to raise this issue waives it on this appeal. *See Laborers' Int'l Union v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir.1994) ("An issue is waived unless a party raises it in its opening brief, and for those purposes a passing reference to an issue . . . will not suffice to bring that issue before this court.") (citations and internal quotation marks omitted).

(Cont'd)

Appendix A

II. JURISDICTION AND STANDARD OF REVIEW

A. Jurisdiction

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, and 1367 in that the complaint alleged federal civil rights claims under 42 U.S.C. § 1983 and supplemental state law claims. Inasmuch as Kopec's appeal was timely we have jurisdiction pursuant to 28 U.S.C. § 1291.

B. Standard of Review

We exercise *de novo* review of the district court's grant of summary judgment. *See Kneipp v. Tedder,* 95 F.3d 1199, 1204 (3d Cir. 1996); *Mark v. Borough of Hatboro,* 51 F.3d 1137, 1141 (3d Cir. 1995). Summary judgment is proper when the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In reviewing the record, we are required to view the inferences to be drawn from the underlying facts in the light most favorable to Kopec, as the party opposing the motion, and to take his allegations as true when supported by proper proofs whenever these allegations conflict with those of Officer Tate. *See Meritcare, Inc. v. St. Paul Mercury Ins. Co.,* 166 F.3d 214, 223 (3d Cir.1999).

(Cont'd)

Moreover, although he included a First Amendment argument in his brief, Kopec informed us at oral argument that he had abandoned that argument because his action properly was characterized as a Fourth Amendment excessive force claim. Thus, the only remaining issue on appeal is whether the district court properly granted summary judgment on Kopec's Fourth Amendment claim against Officer Tate.

Appendix A

III. DISCUSSION

A. Qualified Immunity on a Section 1983 Claim

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Thus, section 1983 provides a remedy for deprivations of rights established elsewhere in the Constitution or federal laws. *Estate of Smith v. Marasco,* 318 F.3d 497, 505 (3d Cir. 2003); *Kneipp,* 95 F.3d at 1204.

Qualified immunity is intended to shield government officials performing discretionary functions, including police officers, "from liability from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982). A defendant has the burden to establish that he is entitled to qualified immunity. *See Beers-Capitol v. Whetzel,* 256 F.3d 120, 142 n.15 (3d Cir. 2001).

Appendix A

The Supreme Court held in *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151 (2001), that a ruling on qualified immunity must be undertaken using a two-step inquiry. *See id.* at 200-01, 121 S.Ct. 2155-56. First, the court must consider whether the facts alleged, taken in the light most favorable to the plaintiff, show that the officer's conduct violated a constitutional right. *See id.* at 201, 121 S.Ct. at 2156; *S.G. ex rel. A.G. v. Sayreville Bd. of Educ.,* 333 F.3d 417, 420 (3d Cir. 2003) (When an individual defendant in a section 1983 action claims he is entitled to qualified immunity, "our first task is to assess whether the plaintiff's allegations are sufficient to establish the violation of a constitutional or statutory right at all.") (quoting *Gruenke v. Seip,* 225 F.3d 290, 298 (3d Cir. 2000)). "If the plaintiff fails to make out a constitutional violation, the qualified immunity inquiry is at an end; the officer is entitled to immunity." *Bennett v. Murphy,* 274 F.3d 133, 136 (3d Cir. 2002).

If, however, "a violation could be made out on a favorable view of the parties' submissions, the next sequential step is to ask whether the right was clearly established." *Saucier,* 533 U.S. at 201, 121 S.Ct. at 2156. "The relevant dispositive inquiry" in making this determination is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202, 121 S.Ct. at 2156. If it would not have been clear to a reasonable officer what the law required under the facts alleged, then he is entitled to qualified immunity.

Appendix A

B. Excessive Force

Our first inquiry on Officer Tate's claim of qualified immunity is whether the facts Kopec asserts, taken in the light most favorable to him, show that Officer Tate violated Kopec's Fourth Amendment rights. "To state a claim for excessive force as an unreasonable seizure under the Fourth Amendment, a plaintiff must show that a 'seizure' occurred and that it was unreasonable." *Estate of Smith,* 318 F.3d at 515 (quoting *Abraham v. Raso,* 183 F.3d 279, 288 (3d Cir. 1999)). Here, Officer Tate does not assert that Kopec's arrest did not constitute a "seizure." Thus, the only issue on this inquiry is whether the force Officer Tate used to effect that seizure was reasonable.

The test of reasonableness under the Fourth Amendment is whether under the totality of the circumstances, "the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivations." *Graham v. Connor,* 490 U.S. 386, 397, 109 S.Ct. 1865, 1872 (1989). Thus, if a use of force is objectively reasonable, an officer's good faith is irrelevant and any bad faith motivation on his part is immaterial. *See Estate of Smith,* 318 F.3d at 515; *Abraham,* 183 F.3d at 289. Factors to consider in making a determination of reasonableness include the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he actively is resisting arrest or attempting to evade arrest by flight. *See Graham,* 490 U.S. at 396, 109 S.Ct. at 1872. A court in making a reasonableness assessment also may consider the possibility that the persons subject to the police action are

violent or dangerous, the duration of the action, whether the action takes place in the context of effecting an arrest, the possibility that the suspect may be armed, and the number of persons with whom the police officers must contend at one time. *See Sharrar v. Felsing,* 128 F.3d 810, 822 (3d Cir.1997). As the Supreme Court has stated,

> [t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

Graham, 490 U.S. at 396-97, 109 S.Ct. at 1872. "[R]easonableness under the Fourth Amendment should frequently remain a question for the jury," *Abraham,* 183 F.3d at 290; however, "'defendants can still win on summary judgment if the district court concludes, after resolving all factual disputes in favor of the plaintiff, that the officer's use of force was objectively reasonable under the circumstances,'" *id.* (quoting *Scott v. Henrich,* 39 F.3d 912, 915 (9th Cir.1994)); *see also Estate of Smith,* 318 F.3d at 516.

Kopec alleges that Officer Tate placed handcuffs on him that were excessively tight and failed to respond to Kopec's repeated requests for them to be loosened. He estimates that

it took Officer Tate ten minutes to loosen the handcuffs despite the severe pain they were causing and his efforts to secure their release. As a result, Kopec claims that he suffered permanent nerve damage to his right wrist. These facts, if credited, would establish that Officer Tate's use of force was excessive in violation of the Fourth Amendment.

In reaching our conclusion that Kopec has asserted facts that if proven would establish that there had been a violation of his constitutional rights, we point out that Officer Tate faced rather benign circumstances that hardly justified his failure to respond more promptly to Kopec's entreaties, at least to the extent to ascertain if the handcuffs were too tight. Officer Tate was not, after all, in the midst of a dangerous situation involving a serious crime or armed criminals. Accordingly, this opinion should not be overread as we do not intend to open the floodgates to a torrent of handcuff claims. Thus, if Officer Tate had been engaged in apprehending other persons or other imperative matters when Kopec asked him to loosen the handcuffs our result might have been different.

With respect to the second inquiry on qualified immunity, it cannot be said as a matter of law that a reasonable officer would not have known that this conduct was in violation of the Fourth Amendment even though it appears that neither the Supreme Court nor this court has ruled that a police officer may be using constitutionally excessive force in tightening handcuffs.[6] The Court of Appeals for the Ninth Circuit has

6. Neither party cites a case from the Supreme Court or this court directly addressing the issue. Indeed, Kopec in his brief (Cont'd)

noted that at least as early as 1985 the use of excessive force by officers in effecting an arrest was clearly proscribed by the Fourth Amendment as it held, quoting a 1985 Supreme Court opinion, that "the Fourth Amendment governs not only whether a person or thing is subject to a 'seizure,' but also 'the manner in which a . . . seizure is conducted.'" *Palmer v. Sanderson,* 9 F.3d 1433, 1436 (9th Cir.1993) (quoting *Tennessee v. Garner,* 471 U.S. 1, 7-8, 105 S.Ct. 1694, 1699 (1985)). Moreover, as we observed in *Burns v. County of Cambria,* 971 F.2d 1015, 1024 (3d Cir.1992), "[t]his court has adopted a broad view of what constitutes an established right of which a reasonable person would have known." (citations and quotation marks omitted). Thus, in *People of Three Mile Island v. Nuclear Regulatory Comm'rs,* 747 F.2d 139, 144-45 (3d Cir. 1984), we held that there does not have to be "precise factual correspondence" between the case at issue and a previous case in order for a right to be "clearly established," and we would not be "faithful to the purposes of immunity by permitting . . . officials one liability-free violation of a constitutional or statutory requirement." Therefore, we hold that the right of an arrestee to be free from the use of excessive force in the course of his

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(Cont'd)

indicates that he "has not found a case from the Third Circuit that discusses excessively tight handcuffs at the inception of an arrest or when a police officer purposefully left excessively tight handcuffs on a suspect over time," brief of Appellant at 12, and Officer Tate in his brief states that "at the time of the plaintiff's arrest, it is apparent that there was no law in this Circuit specifically relating to tight handcuffing, and more specifically, as it relates to the issue of the constitutional implication of loosening tight handcuffing." Brief of Appellee at 17.

handcuffing clearly was established when Officer Tate acted in this case, and that a reasonable officer would have known that employing excessive force in the course of handcuffing would violate the Fourth Amendment. Accordingly, the district court committed error in granting summary judgment in favor of Officer Tate on the basis of his qualified immunity defense.

In reaching our result we point out that other courts of appeals have made determinations consistent with ours. *See, e.g., Martin v. Heideman,* 106 F.3d 1308, 1312 (6th Cir. 1997) (reversing grant of directed verdict in favor of arresting officer in a section 1983 action alleging excessive force due to overly-tight handcuffs); *Alexander v. County of Los Angeles,* 64 F.3d 1315, 1322-23 (9th Cir. 1995) (reversing grant of summary judgment in favor of officers on qualified immunity and holding that fact issue existed as to whether officers used excessive force in refusing to loosen plaintiff's handcuffs); *Palmer,* 9 F.3d at 1436 (9th Cir. 1993) (affirming denial of summary judgment on qualified immunity where deputy allegedly employed excessive force by handcuffing plaintiff so tightly that he was in pain and was left bruised for several weeks).[7]

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7. This case is distinguishable from *Hannula v. City of Lakewood,* 907 F.2d 129, 132 (10th Cir. 1990), in which the Court of Appeals for the Tenth Circuit analyzed an excessive handcuffing claim under a substantive due process standard, rather than the Fourth Amendment reasonableness standard, to conclude that the failure to loosen tight handcuffs did not rise to a clearly established constitutional violation. The court noted that the amount of force used was not substantial, the extent of the injury was minimal, and

(Cont'd)

Appendix A

IV. CONCLUSION

For the foregoing reasons, we will reverse the order of the district court entered on October 22, 2002, and remand the case for proceedings consistent with this opinion.

(Cont'd)
the evidence failed to establish malice. Likewise, *Glenn v. City of Tyler,* 242 F.3d 307, 314 (5th Cir. 2001), is distinguishable in that the plaintiff there failed to show more than a de minimis injury resulting from her tight handcuffing. Where, as here, a plaintiff alleges actual injury inflicted by a police officer in the course of an arrest, and supports his allegation with specific facts so that it cannot be said as a matter of law that the use of force was objectively reasonable, the issue of whether excessive force was employed must be left to the trier of fact.

Appendix A

SMITH, Circuit Judge, Dissenting.

I respectfully dissent from the majority opinion because I believe that the facts, even when viewed in the light most favorable to Kopec, fail to demonstrate that Officer Tate deprived Kopec of the protections of the Fourth Amendment right to be free from the use of excessive force during an arrest. Caselaw establishes that tight handcuffing alone is insufficient to state a claim of excessive force. *E.g. Burchett v. Kiefer,* 310 F.3d 937, 944-45 (6th Cir. 2002). A plaintiff must demonstrate not only that the officer had notice that the force applied by the handcuffs was excessive under the circumstances, but also that the officer failed to respond to such notice in a reasonable manner. *Id.* Here, once Officer Tate had received notice that the force applied by the cuffs may have been excessive, he responded reasonably under the circumstances.

Yet even if the facts *were* sufficient to state a claim of excessive force, I would still be in dissent because I believe that Officer Tate should be entitled to qualified immunity. The Supreme Court has repeatedly instructed that the determination of qualified immunity requires particularizing the constitutional right "in light of the specific context of the case." *Saucier v. Katz,* 533 U.S. 194, 201 (2001). This is where I believe the majority's analysis falls short, because it only relies on the broad proposition that the Fourth Amendment secures the right to be free from the use of excessive force during an arrest, and concludes that Officer Tate violated this clearly established right. This analysis is flawed, in my view, because it fails to determine what the contours of the right were, and neglects to recognize that the

law did not provide Officer Tate with fair warning that he was required to respond more promptly than he did to Kopec's complaint that the handcuffs were too tight.

I would, therefore, affirm the District Court's grant of summary judgment in favor of Officer Tate.

I.

As the Supreme Court instructed in *Saucier,* 533 U.S. at 201, the first inquiry in deciding whether qualified immunity is available is whether there was a violation of a constitutional right. *See also Siegert v. Gilley,* 500 U.S. 226, 231-33 (1991). When an excessive force claim arises in the context of an arrest, it must be "analyzed under the Fourth Amendment and its 'reasonableness' standard." *Graham v. Connor,* 490 U.S. 386, 395 (1989); *see also Tennessee v. Garner,* 471 U.S. 1, 8 (1985) (applying Fourth Amendment's reasonableness standard to § 1983 excessive use of force claim and declaring that one of the factors to be considered is "how [a seizure] is carried out"). The Supreme Court has recognized that the right to make an arrest "carries with it the right to use some degree of physical coercion or threat thereof to effect it," and that " '[n]ot every push or shove'" violates the Fourth Amendment. *Graham,* 490 U.S. at 396 (quoting *Johnson v. Glick,* 481 F.2d 1028, 1033 (2d Cir. 1973)). The *Graham* Court instructed that careful attention must be given to "the facts and circumstances of each particular case" and that the reasonableness of "a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." 490 U.S. at 396.

Similarly, not every instance of tight handcuffing offends the Fourth Amendment's right to be free from the use of excessive force during an arrest. Indeed, several of our sister circuits have recognized as much.[8]

In some circumstances, however, tight handcuffing may give rise to a Fourth Amendment violation. *See Herzog v. Village of Winnetka,* 309 F.3d 1041, 1043 (7th Cir. 2002) (concluding that summary judgment was improperly granted in favor of the officers where plaintiff was arrested without probable cause and handcuffed for an hour despite complaints that the cuffs were too tight). In determining whether Kopec was deprived of his Fourth Amendment right to be free from the use of excessive force, it is instructive to review the

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8. *See also Braun v. Baldwin,* 346 F.3d 761, 763 (7th Cir. 2003) (affirming, *inter alia,* grant of summary judgment for defendants on excessive use of force claim based on tight handcuffing because there was no indication "arrest was effected in an unusual or improper manner"); *Burchett v. Kiefer,* 310 F.3d 937, 944-45 (6th Cir. 2002) (summary judgment for officers on excessive force claim affirmed because officers removed the handcuffs once plaintiff complained they were too tight); *Rodriguez v. Farrell,* 280 F.3d 1341, 1351 (11th Cir. 2002) ("painful handcuffing, without more," is not excessive force); *Glenn v. City of Tyler,* 242 F.3d 307, 314 (5th Cir. 2001) (declaring that "handcuffing too tightly, without more, does not amount to excessive force"); *Carter v. Morris,* 164 F.3d 215, 219 n.3 (4th Cir. 1999) (finding that plaintiff's allegation that she was handcuffed too tightly was "so insubstantial that it cannot as a matter of law support her claim" of excessive force); *Foster v. Metro. Airports Comm'n,* 914 F.2d 1076, 1082 (8th Cir.1990) (court affirmed grant of summary judgment for officers based on tight handcuffing, explaining that plaintiff's allegations of pain alone were insufficient to support his claim of excessive force).

caselaw in which the facts have been sufficient to state a claim. These cases demonstrate that a viable excessive force claim requires that the officer or officers had either constructive or actual notice that the force applied by the handcuffs was excessive under the circumstances, yet the officer or officers failed to respond to such notice in a reasonable manner.[9]

For example, in *Palmer v. Sanderson*, 9 F.3d 1433 (9th Cir. 1993), one of the earliest tight handcuffing cases, the plaintiff's complaints that the handcuffs were too tight and painful provided the officer with constructive notice that

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9. *See Kukla v. Hulm*, 310 F.3d 1046 (8th Cir. 2002); *Bastien v. Goddard*, 279 F.3d 10, 12-13 (1st Cir. 2002) (reversing judgment for officer based on tight handcuffing for more than four hours despite plaintiff's repeated complaints); *Kostrzewa v. City of Troy*, 247 F.3d 633, 639-40 (6th Cir. 2001) (officer documented that he had been able to tighten the cuffs to only the first tooth because the plaintiff had large wrists, yet he ignored plaintiff's persistent complaints that the cuffs were too small and tight until after the plaintiff was booked); *Heitschmidt v. City of Houston*, 161 F.3d 834, 839-40 (5th Cir. 1998) (reversing summary judgment for officers who ignored repeated complaints over a four-hour period and pointing out that the officers had no justification for refusing to adjust the painful cuffs); *Martin v. Heideman*, 106 F.3d 1308, 1310, 1313 (6th Cir. 1997) (plaintiff's complaints that his hands were becoming numb and swollen and the officer's failure to adjust the handcuffs were sufficient to state a Fourth Amendment claim); *Alexander v. County of Los Angeles*, 64 F.3d 1315, 1323 (9th Cir. 1995) (officer failed to adjust handcuffs even though plaintiff complained of pain, alerted the officer that his medical condition necessitated adjusting the handcuffs, and the officer noted that the plaintiff's wrists were "mushy" when he applied the cuffs).

the force used might have been excessive under the circumstances. Despite this notice, the officer refused to loosen the handcuffs. *Id.* at 1436. The Court concluded that "[u]nder these circumstances no reasonable officer could believe that the abusive application of cuffs was constitutional." *Id.*

Although the Ninth Circuit's decision in *Palmer* did not actually use the term "notice" in determining that the facts were sufficient to state a Fourth Amendment violation, substantively its analysis focused on that very issue. Thereafter, a number of circuit courts employed this same analysis, again without discussing the principle of notice, and concluded that there were sufficient facts to state an excessive force claim where the plaintiff's complaints about painful and overly tight handcuffing were ignored by the arresting officers. *See Herzog,* 309 F.3d at 1043; *supra* n.2.

The importance of the notice effected by a plaintiff's complaints that handcuffs are too tight and painful was demonstrated in *Burchett,* 310 F.3d at 937. There, the plaintiff, who had been handcuffed for three hours in a police cruiser, showed his family that his hands were swollen and blue. *Id.* at 941. The family, in turn, pointed this out to the officers, who agreed to release the plaintiff if he promised to behave. After the plaintiff agreed, the cuffs were released. *Id.* Thereafter, plaintiff claimed that the officers had violated his civil rights by using excessive force. The Sixth Circuit disagreed.

The *Burchett* Court recognized that "applying handcuffs so tightly that the detainee's hands become numb and turn

blue certainly raises concerns of excessive force." *Id.* at 944. Furthermore, the Court acknowledged that its own precedents allowed a plaintiff to get to a jury by showing that "officers handcuffed the plaintiff excessively and unnecessarily tightly and ignored the plaintiff's pleas that the handcuffs were too tight." *Id.* at 944-45 (citing *Kostrzewa,* 247 F.3d at 641, and *Heideman,* 106 F.3d at 1310, 1313). Unlike other cases presenting a constitutional violation, the Court explained, the record gave "no indication that [plaintiff] had previously complained or advised the officers that the handcuffs were too tight. . . . Until [the officers] had *notice* that the handcuffs were too tight, the officers were unaware of the problem." *Burchett,* 310 F.3d at 945 (emphasis added). Because the officers had responded to the plaintiff's lone complaint by removing the cuffs, the Court concluded that there was no violation of the plaintiff's Fourth Amendment right.

II.

In determining whether the record in this case presents facts sufficient to demonstrate a claim of excessive force, I consider those facts, as the majority also has, in the light most favorable to Kopec. *See Saucier,* 533 U.S. at 201 (instructing courts to consider threshold question of whether there is a constitutional violation in the light most favorable to the injured party). Accordingly, I rely upon Kopec's account of events. I set forth the facts separately here so that, consistent with *Graham,* they may be analyzed from the perspective of a reasonable officer on the scene. *Graham,* 490 U.S. at 396.

Appendix A

It is undisputed that Officer Tate apprehended Kopec and Smith while they were trespassing on private property around 11 p.m. on a cold, snowy night. Thus, he had probable cause to arrest them. Officer Tate advised Kopec and Smith, however, that "he was going to let [them] go and it was no big deal and that he needed [their] names and addresses" to fill out a report. Kopec inexplicably refused to cooperate with this simple request. Officer Tate then explained why he needed the information. Kopec still refused to provide any information to Officer Tate, prompting the officer to advise the pair that they were "not in trouble and that it was just procedure." Kopec was unmoved. Officer Tate then arrested and handcuffed Kopec.

According to Kopec, the officer

> placed the cuffs on me. We were about 30 feet from his cruiser. Put the cuffs on behind my back and we started to walk towards his cruiser.
>
> And in a very short time, within about ten seconds, I began to lose feeling in my right hand. And I asked if he could loosen the handcuff, that it was too tight. And we continued walking towards the cruiser and I asked him if this is what he does when people don't give him information.
>
> * * *
>
> He ignored me. We got to the cruiser, to the back door, and he spun me, turned me around so that my back was facing the back door. And he proceeded to walk back to Pam the 30 feet.

> And I asked him again. The pain became unbearable to me and I asked him if could take the handcuff[s] off and again asked if this is what he did to get information out from people.

The officer proceeded to interview Smith. Kopec fell to his knees and groaned: "Get the cuffs off, I can't feel my hand." Kopec then stated that the pain was "unbearable." Officer Tate acknowledged the complaint and informed Kopec that he would "be there in a minute." Kopec groaned again: "Get these cuffs off, I can't feel anything right now." Officer Tate stopped interviewing Smith, returned to the cruiser, and assisted Kopec up off the ground. In order to assess the restrictiveness of the cuffs, Officer Tate escorted Kopec to the rear of the cruiser and laid him on the trunk to view the restraints. Officer Tate asked him if it was permissible to remove Kopec's gloves. After Kopec assented, Tate loosened the cuffs.

Kopec's initial statement to Officer Tate did not communicate anything more than a complaint about tightness. From the perspective of a reasonable officer, it would not have been unusual for an arrestee to initially request that the cuffs be adjusted or loosened. Handcuffs, by their very nature, are restrictive, uncomfortable, and unfamiliar to most individuals. Although Kopec affirmed during his deposition that he experienced a loss of feeling within about ten seconds of being cuffed, careful reading of his testimony reveals that he did not express this to Officer Tate.

Kopec's second request to have the cuffs removed was also devoid of any suggestion that the cuffs were too

restrictive or were causing him pain. Although Kopec testified to the effect that he experienced unbearable pain, he did not advise Officer Tate of that fact. Rather, Kopec testified that he "asked him if he could take the handcuff[s] off and again asked if this is what he did to get information out from people." From a reasonable officer's viewpoint, this second request to remove the cuffs, together with the repeated inquiry about Officer Tate's tactics for obtaining information, could reasonably be viewed as theatrics by Kopec protesting his arrest and the application of handcuffs.

When Kopec fell to the ground, groaned, and stated that he could not feel his hand, Officer Tate was, for the first time, put on notice that the force applied by the cuffs may have been excessive. In light of Kopec's earlier conduct, a reasonable officer would have had reason to question the genuineness of this complaint. Because this complaint may have been theatrics and because Officer Tate was legitimately engaged in interviewing Smith, it was not unreasonable for Officer Tate to proceed with the task in which he was already engaged. Indeed, interviewing Smith was necessary because of Kopec's refusal to provide any information whatsoever. When Kopec groaned again and demanded that Officer Tate remove the cuffs because he was unable to feel his hand, Officer Tate interrupted his interview of Smith and returned to Kopec's side to evaluate the cuffs.

Viewed from the perspective of a reasonable officer, Tate's conduct was not, in my view, unreasonable. He was constitutionally permitted to apply some force in arresting Kopec. After receiving notice that the force applied by the cuffs may have been excessive, Officer Tate responded reasonably.

Appendix A

I acknowledge that there was a brief delay in responding to Kopec's complaints. That delay, however, was not unreasonable in the absence of any indication of pain or suffering in Kopec's initial statements that would have conveyed to Tate that the force was excessive under the circumstances. Once Kopec fell to the ground and demanded the removal of the cuffs claiming a lack of feeling in his hand, Officer Tate advised that he would "be there in a minute" and responded within a reasonable period of time.

In my view, the totality of the circumstances considered by the majority has not adequately taken into account the fact that there was only one officer at the scene, and that he was occupied with another task that was a legitimate police duty. In explaining its assessment of the attendant circumstances, the majority points out that Officer Tate "faced rather benign circumstances that hardly justified his failure to respond more promptly to Kopec's entreaties. . . . Officer Tate was not, after all, in the midst of a dangerous situation involving a serious crime or armed criminals." Maj. at 777. I agree that Officer Tate was not immediately confronted with a dangerous situation. Yet from the perspective of a reasonable officer, on the scene alone and dealing with two trespassers who were inexplicably unresponsive to his inquiries, there was justification for the officer's refusal to immediately indulge Kopec's initial requests so that the interview with Smith might continue.

In sum, I conclude that Kopec has failed to establish that there was a violation of his Fourth Amendment right to be free from the use of excessive force. Ordinarily, in the absence of a constitutional violation, "there is no necessity for further

inquiries concerning qualified immunity." *Saucier,* 533 U.S. at 201. I address the issue of qualified immunity only because I believe that, even if there was sufficient evidence to demonstrate a constitutional violation, Officer Tate should be accorded qualified immunity.

III.

The Supreme Court has repeatedly instructed that the determination of qualified immunity requires particularizing the constitutional right and determining the contours of that right. *See Saucier,* 533 U.S. at 201-02 (discussing *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)). In *Saucier,* the Supreme Court held that a "ruling on qualified immunity requires an analysis not susceptible of fusion with the question whether unreasonable force was used in making the arrest." 533 U.S. at 197. Thus, the determination of whether there is a constitutional violation is not co-extensive with the issue of whether a government official is entitled to qualified immunity. For that reason, the Supreme Court laid out the now familiar framework for analyzing qualified immunity claims, instructing that the first inquiry is whether there is a constitutional violation. *Id.* at 200. If such a violation is demonstrated, the next "step is to ask whether the right was clearly established." *Id.* at 201. The Supreme Court reiterated that this second "inquiry, it is vital to note, must be undertaken *in the light of the specific context of the case,* not as a broad general proposition." *Id.* (emphasis added).

Consistent with this iteration, the *Saucier* Court observed that *Graham*'s general proposition that the use of excessive

force is contrary to the Fourth Amendment was not particularized enough for the purpose of determining whether the law was clearly established. 533 U.S. at 201-02. Quoting *Anderson v. Creighton,* the Court emphasized that the "'contours of the right must be sufficiently clear,'" and it instructed that

> [t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. . . . If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate.

Saucier, 533 U.S. at 202 (quoting *Anderson,* 483 U.S. at 640).

In *Bennett v. Murphy,* 274 F.3d 133, 136 (3d Cir. 2002), we observed that the twopart test enunciated in *Saucier* "clarif[ied] the analysis to be undertaken by district courts and courts of appeals considering claims of qualified immunity in cases alleging excessive use of force." Although my colleagues have employed the two-part test set forth in *Saucier,* I do not believe that their reliance on only the Fourth Amendment's broad, general proscription against the use of excessive force is sufficient because it fails to take into account the situation confronting Officer Tate.

Supreme Court qualified immunity jurisprudence has long required that courts undertake a particularized inquiry. In the seminal case of *Anderson,* the Supreme Court observed

that the determination of whether there is qualified immunity "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." 483 U.S. at 639 (examining qualified immunity in the context of a warrantless search). The Court recognized that if the test were applied at a general level, as I believe the majority does here, then "[p]laintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability. . . ." *Id.* Whether a legal rule is "clearly established," the Court instructed, must be considered in a

> *more particularized,* and hence, more relevant sense: The *contours of the right* must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. (citations omitted) (emphasis added).

Subsequently, in *Wilson v. Layne,* 526 U.S. 603 (1999), the Supreme Court concluded that allowing the media to ride along during the execution of a search warrant violated the Fourth Amendment. In determining whether qualified immunity was available to the officers, the Supreme Court

reviewed its decisions in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), and *Anderson, supra,* observing that

> [i]t could plausibly be asserted that any violation of the Fourth Amendment is "clearly established," since it is clearly established that the protections of the Fourth Amendment apply to the actions of police.... However, as we explained in *Anderson,* the right allegedly violated must be defined at the *appropriate level of specificity* before a court can determine if it was clearly established. In this case, the appropriate question is the objective inquiry whether a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful, in light of clearly established law and the information the officers possessed.

526 U.S. at 615 (emphasis added) (citations omitted). The Court held that it was not unreasonable for the officers to believe their conduct was lawful. In explaining its holding, the Supreme Court pointed to the absence of caselaw regarding the constitutionality of allowing the media to accompany police, as well as the existence of a government policy by the United States Marshal Service regarding the practice, and declared that the "state of the law . . . was at best undeveloped." 536 U.S. at 618. The Court further noted that a circuit split had developed on the question and declared that "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Id.*

Most recently, in *Hope v. Pelzer,* 536 U.S. 730 (2002), the Supreme Court reversed the Eleventh Circuit's determination that qualified immunity precluded liability for a prisoner's claims that his Eighth Amendment rights had been violated when he was handcuffed to a hitching post for seven hours. Citing its earlier precedents, the Supreme Court declared that the "salient question . . . is whether the state of the law in 1995 gave respondents *fair warning* that their alleged treatment of [the inmate] was unconstitutional." *Id.* at 741 (emphasis added). It concluded that the defendant officials had fair warning that the use of the hitching post under the circumstances alleged by Hope was unlawful, noting two Eleventh Circuit decisions and a report by the Department of Justice regarding the unconstitutionality of Alabama's practice of using the hitching post. *Id.* at 743-45. In addition, the Court observed that the "obvious cruelty inherent in this practice should have provided respondents with some notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment." *Id.* at 745-46.

Accordingly, consistent with *Hope, Saucier, Wilson* and *Anderson,* I consider what the contours of the right were at the time of Kopec's arrest and whether they were sufficiently clear to put Officer Tate on notice that his conduct would violate the Fourth Amendment right to be free from the use of excessive force. *Saucier,* 533 U.S. at 202.

In February 2000, only a handful of cases of § 1983 claims involving tight handcuffing were extant. *See Carter v. Morris,* 164 F.3d 215, 219 n.3 (4th Cir. 1999); *Heitschmidt v. City of Houston,* 161 F.3d 834, 839-40 (5th Cir. 1998);

Martin v. Heideman, 106 F.3d 1310, 1313 (6th Cir. 1997); *Alexander v. County of Los Angeles,* 64 F.3d 1315, 1323 (9th Cir. 1995); *Palmer v. Sanderson,* 9 F.3d 1433, 1436 (9th Cir. 1993); *Foster v. Metro. Airports Comm'n,* 914 F.2d 1076, 1082 (8th Cir. 1990). Significantly, in *Carter* and *Foster,* tight handcuffing alone was insufficient to establish an excessive force claim. The remaining cases, however, concluded there were sufficient facts to demonstrate a Fourth Amendment violation. As I point out above, the common thread in these latter cases is that: (1) the arrestee complained that the cuffs were too tight and painful, thereby providing notice to the officer(s) that the force applied may have been excessive under the circumstances; and (2) the officer(s) failed to reasonably respond to the arrestee's complaints. Thus, the caselaw in February 2000 established that liability may attach if an officer unreasonably ignores or is indifferent to the complaints of an arrestee that the force applied by the handcuffs may be excessive under the circumstances.

Prior to the incident at issue in this case, the caselaw did not provide any guidance with respect to how quickly an officer must respond to a complaint that handcuffs have been applied too tightly. Nor was there any guidance in the cases as to how an officer should prioritize his response when there are other tasks in which he is legitimately engaged or may be required to undertake at the time.

In light of this caselaw, I conclude that Tate could have reasonably believed that his response to Kopec's complaints was lawful. To put it another way, I believe the law did not put Officer Tate on notice that he had to respond immediately to Kopec's complaint that the handcuffs were too tight.

Nor was there any caselaw providing Officer Tate with fair notice that he must stop engaging in the legitimate police task at hand, *i.e.*, interviewing Smith, in order to assess whether the handcuffs were too tight. Because the caselaw did not provide Tate with notice that his response was unlawful, he should be entitled to qualified immunity. *See Hope,* 536 U.S. at 741; *Saucier,* 533 U.S. at 202.

In summary, I conclude that the facts fail to demonstrate a violation of the Fourth Amendment right to be free from the use of excessive force. Even if the facts did state a claim of excessive force, Officer Tate should be entitled to qualified immunity. Accordingly, I would affirm the District Court's order granting summary judgment for Officer Tate.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED OCTOBER 16, 2002

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 02-CV-430

MICHAEL KOPEC,

Plaintiff,

v.

OFFICER TYRONE TATE and
TOWNSHIP OF WHITEMARSH,

Defendants.

MEMORANDUM AND ORDER

JOYNER, J. October 16, 2002

Presently before the Court is the Motion for Summary Judgment of Defendants, Officer Tyrone Tate ("Defendant" or "Officer Tate") and Township of Whitemarsh. In this case, Plaintiff Michael Kopec ("Plaintiff") brought a civil rights claim and state law claims against Defendant Officer Tyrone Tate and a civil rights claim against Defendant Township of Whitemarsh. Plaintiff brings claims against Defendant under

42 U.S.C. § 1983, alleging that his rights were violated pursuant to the First, Fourth, and Fourteenth Amendments. Additionally, Plaintiff brings claims under state tort law for willful misconduct and intentional infliction of emotional distress. Plaintiff does not contest Defendants' motion on Plaintiff's claim against the Township of Whitemarsh. For the reasons that follow, the Court will grant summary judgment.

BACKGROUND

On February 3, 2000, Plaintiff Michael Kopec and his girlfriend Pamela Smith (whom Plaintiff later married) trespassed onto a frozen pond, which was surrounded by a fence, located in Smith's apartment complex. In response to an anonymous phone call, Defendant Officer Tate arrived at the scene and directed Plaintiff and Smith to get off the frozen pond, ending their playful time on the ice. Initially, Officer Tate did not charge them with any violation, but Defendant required their names and addresses in order to file a routine report. Plaintiff refused to disclose such information, and subsequently as a result, Defendant Officer Tate arrested him for trespassing. Plaintiff was then handcuffed. Soon thereafter, Plaintiff complained that the handcuffs were too tight. Plaintiff contends that the handcuffs caused him excruciating pain and he requested several times that they be loosened. Meanwhile, Defendant Officer Tate was interviewing Smith nearby. After Plaintiff fell to his knees in pain, Defendant came over to Plaintiff and readjusted Plaintiff's handcuffs. Plaintiff was arrested, taken to the police station, and charged with a citation for disorderly conduct. Plaintiff alleges injuries caused by this incident.

Appendix B

Defendants now move for summary judgment, claiming that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law because they are immune from suit.

DISCUSSION

I. *Legal Standard*

In deciding a motion for summary judgment under Fed. R. Civ. P. 56(c), a court must determine "whether there is a genuine issue of material fact and, if not, whether the moving party is entitled to judgment as a matter of law." *Medical Protective Co. v. Watkins,* 198 F.3d 100, 103 (3d Cir.1999) (internal citation omitted). When making this determination, courts should view the facts, and reasonable inferences drawn therefrom, in the light most favorable to the non-moving party. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). For its part, the non-moving party must, through affidavits, admissions, depositions, or other evidence, demonstrate that a genuine issue exists for trial. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986). In making its showing, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts," *id.* at 586, and must produce more than a "mere scintilla of evidence in its favor" to withstand summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986). If the non-moving party fails to create "sufficient disagreement to require submission [of the evidence] to a jury," the moving party is entitled to judgment as a matter of law. *Liberty Lobby,* 477 U.S. at 251-52.

Appendix B

II. *Plaintiff's Civil Rights Claims Under § 1983*

1. Fourth Amendment Excessive Force Claim

Plaintiff alleges that Defendant Officer Tate violated his civil rights under the Fourth Amendment by using excessive force during the course of Plaintiff's arrest. Specifically, Plaintiff contends that Defendant purposefully handcuffed Plaintiff with excessive tightness and maliciously refused to loosen the handcuffs within a reasonable time after Plaintiff complained about the pain caused by the handcuffs. Defendant asserts a defense of qualified immunity.

As the initial inquiry into whether the qualified immunity defense applies, this Court considers the threshold question: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz,* 533 U.S. 194, 201 (2001).[1]

Plaintiff contends that his Fourth Amendment right was violated because of excessive force used in his arrest. Plaintiff speculates that Defendant possibly applied the handcuffs with excessive tightness because of annoyance or irritation.

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1. In *Saucier v. Katz,* the Supreme Court held that the inquiries into excessive force and qualified immunity remain distinct. 533 U.S. 194, 204 (2001). Since the Court did not rest their conclusion on the excessive force determination but rather on qualified immunity, *id.* at 208, we will also examine whether qualified immunity bars this suit, using the two-step analysis laid out in *Saucier.* We consider Plaintiff's excessive force claim in determining *Saucier* 's threshold question of whether a constitutional right has been violated.

In reviewing the record, however, we find that Defendant Officer Tate acted with "objective reasonableness" in executing a routine arrest. *See Graham v. Connor,* 490 U.S. 386, 396-97 (1989). Under the facts alleged, Plaintiff has not shown that Defendant did not act under the objective standard of reasonableness, and as such, Plaintiff has failed to establish a constitutional violation. Therefore, this Court finds that there is no genuine issue of material fact regarding whether Defendant violated a constitutional right by handcuffing the Plaintiff. Defendant is entitled to judgment as a matter of law because a constitutional right has not clearly been violated.

Assuming *arguendo* that the constitutional violation allegation could have been established, we will move to the next sequential step in the qualified immunity analysis: The constitutional right that has been allegedly violated must be "clearly established." *Anderson v. Creighton,* 483 U.S. 635, 640 (1987). "The relevant dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier,* 533 U.S. at 202.

Defendant Officer Tate handcuffed Plaintiff pursuant to a lawful arrest for trespassing. Plaintiff alleges that Defendant handcuffed him with excessive tightness and then delayed in loosening the handcuffs for up to ten minutes after Plaintiff's complaints. Following his training as a police officer and his common sense, Defendant assessed the situation and then readjusted Plaintiff's handcuffs. After reviewing the record, this Court finds that there is no genuine issue of material fact regarding whether a reasonable officer

would consider Defendant's actions in this situation to be unlawful. Rather, it appears to the Court that this routine arrest is a clear example of when qualified immunity applies to protect a police officer from liability for civil damages. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986) (holding that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law"). Therefore, since there is no dispute in material fact as to whether a reasonable officer would consider Defendant's actions during the course of the arrest as clearly unlawful and Defendant is entitled to judgment as a matter of law, we find that qualified immunity applies and summary judgment is appropriate.

2. Plaintiff's First Amendment Claim

Plaintiff also alleges that his First Amendment right was violated because he was "punished" for refusing to give Defendant Officer Tate information regarding his name and address. Plaintiff concedes that it was not unreasonable for Defendant to request such information, and Plaintiff also concedes that there was probable cause to arrest him for trespassing. Since Plaintiff was handcuffed pursuant to a lawful arrest and Plaintiff has failed to allege facts that show Defendant could have reasonably believed he was clearly acting unlawfully, Plaintiff has failed to show that his constitutional right was violated because of his silence. For the reasons stated above, qualified immunity shields Defendant from Plaintiff's First Amendment claim as well.

Appendix B

III. *Plaintiff's State Tort Claims*

Plaintiff's Complaint alleges intentional, willful misconduct and intentional infliction of emotional distress. Defendant argues that he is immune from Plaintiff's state law claims under the Pennsylvania Political Sub-Division Tort Claims Act, 42 Pa.C.S.A. § 8541 ("Tort Claims Act"). Section 8541 of the Tort Claims Act provides: "Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person." This immunity extends to employees of the local agency under § 8545, which states: "An employee of a local agency is liable for civil damages on account of any injury to a person or property caused by acts of the employee which are within the scope of his office or duties only to the same extent as his employing local agency and subject to the limitations imposed by this subchapter." Although the Tort Claims Act provides state and municipal officials with immunity from liability for damages resulting from their acts, immunity under the Tort Claims Act does not extend to "acts that are judicially determined to be crimes, actual fraud, actual malice, or willful misconduct." *Renk v. City of Pittsburgh,* 641 A.2d 289, 292 (1994); *see* 42 Pa.C.S.A. § 8550; *see also Phillips v. Heydt,* 197 F. Supp. 2d 207 (E.D. Pa. Apr. 18, 2002).

After reviewing the record, however, this Court finds that there is no genuine issue of material fact as to whether Defendant acted with actual malice or willful misconduct. Plaintiff has not presented any evidence to suggest that Defendant handcuffed Plaintiff and delayed in loosening the

handcuffs out of malice. This Court also finds that Defendant's actions during the course of the arrest did not constitute willful misconduct. In addition, Defendant Officer Tate's actions do not fall within any other appropriate exception to the Tort Claims Act. Therefore, since Defendant is covered by the Tort Claims Act and there is no genuine issue of material fact and Defendant is entitled to judgment as a matter of law, summary judgment is granted on all state law claims.

CONCLUSION

An appropriate Order follows.

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 02-CV-430

MICHAEL KOPEC,

Plaintiff,

v.

OFFICER TYRONE TATE and
TOWNSHIP OF WHITEMARSH,

Defendants.

ORDER

AND NOW, this 16th day of October, 2002, upon consideration of the Defendants Officer Tyrone Tate and Township of Whitemarsh's Motion for Summary Judgment and Plaintiff's response thereto, it is hereby ORDERED that, for the reasons set forth in the accompanying Memorandum, the Motion is GRANTED.

BY THE COURT:

s/ J. Curtis Joyner
J. CURTIS JOYNER, J.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED APRIL 20, 2004

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 02-4188

MICHAEL KOPEC,

Appellant

v.

TYRONE TATE, OFFICER;
TOWNSHIP OF WHITEMARSH

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 02-00430)
District Judge: Honorable J. Curtis Joyner

SUR PETITION FOR REHEARING

BEFORE: SCIRICA, *Chief Judge*, SLOVITER, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF, FISHER, and GREENBERG, *Circuit Judges*

The petition for rehearing filed by appellee, officer Tyrone Tate, in the above captioned matter having been submitted to the judges who participated in the decision of

this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied. Judge Greenberg's vote is limited to denying rehearing before the original panel.

BY THE COURT

/s/ Morton I. Greenberg
Circuit Judge

DATED: April 20, 2004

(2)

Supreme Court, U.S.
FILED
SEP 21 2004
OFFICE OF THE CLERK

No. 04-112

IN THE

Supreme Court of the United States

TYRONE TATE,

Petitioner,

v.

MICHAEL KOPEC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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RESPONDENT'S STATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Third Circuit Court of Appeals properly found that it was clearly established that the Fourth Amendment applied to a police officer who refused to make a prompt and reasonable inspection to ascertain the validity of a suspect's immediate and repeated complaints of extreme pain due to excessively tight handcuffs when benign circumstances were present and when the failure to loosen the handcuffs for at least ten minutes caused the suspect permanent nerve damage to his wrist?

2. Whether there exists a split among the Federal Circuit Courts of Appeals with regard to the resolution of the question above.

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RESPONDENT'S STATEMENT OF THE CASE

In the evening of February 3, 2000, Respondent Michael Kopec and his girlfriend, Pamela Smith (whom Respondent later married), trespassed onto the frozen lake at the Sherry Lake Apartment Complex in Conshohocken (Whitemarsh Township), Montgomery County, Pennsylvania (A9-10). This lake, which was surrounded by a fence, was on the property where Pamela Smith (now Pamela Kopec) rented an apartment (A11). To gain entrance to the lake, Respondent jumped over the fence while Pamela Kopec squeezed through an opening (A11-12). There were no "No Trespassing" or similar signs on the fence or in the vicinity (A56).

Respondent who was, and still is, an electrical engineer employed by Lockheed-Martin, (A8) and Pamela Kopec were frolicking on the ice when Petitioner Officer Tyrone Tate arrived in response to an anonymous call (A133). Officer Tate directed both of them to get off the lake, a command which both of them promptly complied with (A22).

Officer Tate did not intend to charge Respondent or Pamela Kopec with trespassing or anything else, but he wanted to obtain their names, addresses and telephone numbers for his routine records (A25; 138). Officer Tate repeatedly asked Respondent for this information, but Respondent refused to provide it. Respondent also told Pamela Kopec not to provide this (A25-27). Officer Tate was annoyed and frustrated that on this night, after a snowstorm, he had to spend all this time with Respondent merely because Respondent would not provide identifying data (A143-144; 176-177). Eventually, Officer Tate arrested Respondent for disorderly conduct, and handcuffed him behind his back (A149-150). In describing Officer Tate's demeanor prior to

handcuffing Respondent, Pamela Kopec said that he "seemed to get annoyed or irritated." (A103)

Within about ten seconds of being handcuffed, Respondent began to lose feeling in his right hand and expressed this Officer Tate, requesting that he loosen the handcuffs, but Officer Tate ignored him (A30). Respondent asked the officer if "this is what you do when people don't give you information." Still, the officer ignored him (A30).

Officer Tate took Respondent to his police car several feet away and left him there alongside of it as he went to interview Pamela Kopec, who was close by (A30-31). As Officer Tate walked away from Respondent, Respondent told him the pain was now unbearable and begged Officer Tate to loosen the handcuffs. Again, Respondent was ignored. Soon thereafter, Respondent began to feel faint from the pain caused by the handcuffs and fell to the ground. A fourth time he implored Officer Tate to take the handcuffs off him and told him that he could not feel his right hand anymore. For he first time, Officer Tate responded. The officer said that "he will be there in a minute," but he made no effort to come to Respondent within that time. Then, for the fifth time, Respondent asked Officer Tate to loosen or remove the handcuffs because of the excruciating pain he was suffering from the excessively tight handcuffing (A30-31; 99; 103). Officer Tate admits that he heard, but ignored, Respondent's requests to loosen the handcuffs (A162; 165). Finally, Officer Tate loosened the handcuffs.

While Respondent testified at his deposition that the handcuffs were on him for about ten minutes before they were loosened (A38), Pamela Kopec stated that the handcuffs were on Respondent for ten to fifteen minutes before they

were loosened (A107-108). Officer Tate recalls this time period as between four to eight minutes (A167).

The excessively tight handcuffs applied to Respondent's right wrist caused him to suffer permanent nerve damage to that wrist. He was under the care of a hand surgeon for over a year. See reports of Randall W. Culp, M.D. dated December 14, 2001 (A200-201), and September 17, 2002 (A202).

Even though there was no signage on the fence surrounding the lake on which Respondent trespassed or nearby, Respondent concedes that he was trespassing under 18 Pa. C.S.A. § 3503(b)(1)(iii). Although, typically, at worst, someone would be charged with trespassing in this situation and would be given a citation, Respondent concedes that under the circumstances, Officer Tate was lawfully able to arrest and handcuff him.

Respondent, as well as Pamela Kopec, were wrongfully charged with disorderly conduct and found not guilty (A56-57). Respondent further concedes that neither the incorrect charge nor the disposition of his case in their favor before the local District Justice is material to this civil rights case.

REASONS FOR DENYING THE PETITION

1. **It was clearly established in the Third Circuit that the Fourth Amendment applied to a police officer who refused to make a prompt and reasonable inspection to ascertain if a suspect's immediate and repeated complaints of extreme pain due to excessively tight handcuffs were valid when benign circumstances were present and when the failure to loosen the handcuffs for at least ten minutes caused the suspect permanent nerve damage to his wrist.**

Although some of the language used by the Third Circuit Court of Appeals in its Opinion in this case appears to be "general" as Tate claims, clearly the Opinion addressed the particularized facts it was confronted with for purposes of its analysis. The Court discussed the immediate and severe wrist pain Kopec was suffering from due to the excessively tight handcuffing and the court stated how Kopec repeatedly expressed to Officer Tate, soon after the Officer applied the handcuffs, that Kopec was experiencing great pain in his wrists due to this handcuffing. The Court further described the rather benign circumstances the officer was facing in this summary trespass case and the Court reviewed the police officer's failure to promptly inspect the handcuffs on Kopec's wrists to determine whether they were, in fact, too tight. Then the court pointed out that by the time Officer Tate did take a look, at least ten minutes after he had applied the handcuffs, it was too late. Although the police officer did finally loosen the handcuffs, permanent nerve damage to Kopec's right wrist had already occurred.

Hope v. Pelzer, 536 U.S. 730 (2002), was the last Supreme Court case setting forth the legal analysis to be

applied in determining the meaning of "clearly established" for purposes of litigation of a claimed violation of a federal constitutional right. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Malley v. Briggs*, 475 U.S. 335 (1986); *Anderson v. Creighton*, 483 U.S. 635 (1987); *United States v. Lanier*, 520 U.S. 259 (1997); *Wilson v. Layne*, 526 U.S. 603 (1999) and *Saucier v. Katz*, 533 U.S. 194 (2001). Pursuant to these cases, the constitutional right that Kopec asserts was violated by Officer Tate was "clearly established" prior to the incident giving rise to the suit.

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of preexisting law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. at 640.

Purposeful, unjustified physical abuse by a police officer of a suspect is a clearly established constitutional violation throughout this nation. Whether the physical abuse is by a beating or by any other means makes no difference. The precise conduct need not have been previously held to be unlawful in order for a police officer to forfeit his claim to qualified immunity. *Wilson v. Layne*, 526 U.S. at 615 (1999). Law enforcement officials can no longer claim they were not on notice that particular conduct, that was obviously or inherently cruel, was unconstitutional just because a court in the officer's circuit had not yet ruled that the specific

conduct the police officer engaged in was illegal. As the Supreme Court explained in *Hope v. Pelzer*, 536 U.S. at 14, "Our opinion in *Lanier* thus makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances." Indeed, in *Lanier*, we expressly rejected a requirement that previous cases be "fundamentally similar." Although earlier cases involving "fundamentally similar" facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with "materially similar" facts."

In *Watkins v. City of Oakland*, 145 F.3d 1087, 1092-3 (9th Cir. 1998) the purposefully long duration of a police dog bite and the police encouragement of the continuation of the dog attack amounted to excessive force. The police had to be on notice that the egregiousness of their behavior amounted to a Fourth Amendment violation, and that this was clearly established even though there was no prior specific precedent in the circuit for such a holding. In *Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003), the court stated, "We need no federal case directly on point to establish that kneeling on the back and neck of a compliant detainee, and pressing the weight of two officers' bodies on him even after he complained that he was choking and in need of air violates clearly established law, and that reasonable officers would have been aware that such was the case." In *Clem v. Corbeau*, 284 F.3d 543, 553 (4th Cir. 2002), the court stated, "[A] constitutional right is clearly established for qualified immunity purposes not only when it has been 'specifically adjudicated' but also when it is 'manifestly included within more general applications of the core constitutional principles invoked."

And, in *Murrell v. School District No. 1, Denver*, 186 F.3d 1238, 1251 (10th Cir. 1999), the court held that "We have never said that there must be a case presenting the exact fact situation at hand in order to give parties notice of what constitutes actionable conduct. Rather, we require parties to make reasonable applications of the prevailing law to their own circumstances." In *Suboh v. District Attorney's Office of Suffolk Dist.*, 298 F.3d 81. 93 (1st Cir. 2002), the court declared, "We have no doubt that there is a clearly established constitutional right at stake, although we have found no case exactly on all fours with the facts of this case. The difference in contexts in which the right is discussed in the case law does not mean such a right does not exist."

Courts have consistently held that "officers using unnecessary, gratuitous, and disproportionate force to seize a secured, unarmed citizen do not act in an objectively reasonable manner." *Jones v Buchanan*, 325 F.3d 520, 532 (4th Cir. 2003). Therefore, for example, in *LaLond v. County of Riverside*, 204 F.3d 947, 961 (9th Cir. 2000), the Ninth Circuit Court of Appeals wrote that pepper spray "may be reasonable as a general policy to bring an arrestee under control, but in a situation in which an arrestee surrenders and is rendered helpless, any reasonable officer would know that a continued use of the weapon or a refusal without cause to alleviate its harmful effects constitutes excessive force." And a year later in *Deorle v. Rutherford*, 272 F.3d 1272, 1274-5 (9th Cir. 2001), that same court declared, "Notwithstanding the absence of direct precedent . . . , officers would [otherwise] escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct."

Tate makes reference in his Brief, at pages 15-17, to an unpublished Opinion from the Third Circuit, *Istvanik v. Rogge*, 50 Fed. Appx. 533, 537, 2002 U.S. App. LEXIS 22436, **7-8 (3d Cir. 2002) (unpub.) However, what is quite revealing and distinguishable in that Opinion, as compared to the case now under consideration, is that the Court in the *Istvanik* case stated as follows,

> [t]here is nothing in Plaintiff's testimony from which the Court can conclude that Plaintiff was repeatedly complaining of pain and Officer Rogge callously ignored these complaints." App. at 37. Istvanik argues that this statement is false because he testified that he was in pain while double-cuffed. However, Istvanik has taken the district court's statement out of context. The district court was referring to the time after Istvanik had been double-cuffed, while he sat on the floor of the holding cell. There is nothing in the record, and indeed Istvanik points to nothing, that suggests that Istvanik complained to Rogge after being double-cuffed and that the officer then ignored the complaints.

In addition, in *Istvanik*, the suspect who had been arrested for drunk driving, was "thoroughly uncooperative," and he only complained afterwards that the handcuffs were "too tight." Furthermore, he provided no evidence of injury. In the instant case, in distinct contrast, Kopec repeatedly begged Officer Tate to loosen or remove the handcuffs because they were causing him excruciating pain, Kopec's lack of cooperation was only that he would not provide his name, address and telephone number, and Tate willfully and maliciously ignored Kopec for at least ten minutes which

caused Kopec to suffer permanent nerve damage to his right wrist. While the police officer's conduct in *Istvanik* was "objectively reasonable," the police officer's conduct in the instant case clearly was not.

While there are a vast number of cases throughout the Circuits that substantiate what "clearly established" means in the context of excessive force and other claims of constitutional violations when no specific factual precedent existed, the Third Circuit has had its share of such cases as well. In *Brown v. Muhlenberg Tp.*, 269 F.3d 205, 211 n.4 (3d Cir. 2001), *reh'g and reh'g en banc denied*, 273 F.3d 390 (3d Cir. 2001), the court explained that a reasonable officer should have known from general well-established principles flowing from the Fourth Amendment "that he could [not] lawfully destroy a pet who posed no immediate danger and whose owners were known, available, and desirous of assuming custody." In *Sterling v. Borough of Minersville*, 232 F.3d 190, 197, 198 (3d Cir. 2000), the court stated that a "constitutional violation with respect to threatened disclosure of sexual orientation was apparent notwithstanding fact that very action in question had not previously been held to be unlawful." And in *Gruenke v. Seip*, 225 F.3d 290, 300 (3d Cir. 2000), the court concluded that "[m]erely because the Supreme Court has not yet ruled on whether a school official's administration of a pregnancy test to a student violates her Fourth Amendment rights does not mean the right is not clearly established."

Therefore, even though there was no fact-specific published case in the Third Circuit to support the opinion in the matter now under consideration, pursuant to principles of law firmly and clearly stated in the decisions the United States Supreme Court, the Third Circuit Court of Appeals

and in all the other Circuits, Officer Tate knew or should have known that he was committing a Fourth Amendment clearly established excessive force violation. "No reasonable officer would believe that the abusive application of handcuffs was constitutional." *Palmer v. Sanderson*, 9 F.3d 1433, 1436 (9th Cir. 1993). *See also Martin v. Heideman*, 106 F.3d 1308, 1312 (6th Cir. 1997);); *Alexander v. County of Los Angeles*, 64 F.3rd 1315 (9th Cir. 1995); *Calamia v. City of New York*, 879 F.2d 1025 (2d Cir. 1989).

2. A split in the Circuits does not exist with regard to a law enforcement officer purposefully using handcuffs to cause a suspect extreme pain.

Officer Tate sets forth numerous cases in his Brief in an effort to show that there is substantial conflict in the Circuits with regard to whether the use of handcuffing can amount to an excessive force claim under the Fourth Amendment. Had Tate, instead, collected all the cases he could find pertaining to the use of police officers' nightsticks, fists, flashlights, or police dogs, etc., he also would have found a range of results throughout the Circuits. The reason for this is that while the constitutional analysis is consistent, the results are dependent on the various factual circumstances of each case. Whether the claimed use of excessive force is by handcuffing or by any other means, the core constitutional principles to be applied are the same, and they have been thoroughly established by the Supreme Court as well as by the Third Circuit. This has been analyzed under the first argument in this Brief in Opposition.

Therefore, a review of the cases provided by Tate does not support a conflict among the Circuits in instances when the circumstances were similar to the matter now under

consideration. The courts in those cases have uniformly held that a claim of excessive force was made out when the police officer (a) was aware that the handcuffed suspect was repeatedly claiming that the cuffs were causing him extreme pain, (b) the officer purposefully ignored the suspect for a period of time, (c) the officer was not confronted with a serous crime or a dangerous situation that prevented him from promptly determining if the suspect's claim was authentic, and (d) as a consequence of the officer's failure to ascertain if the suspect's claim was valid, the suspect sustained serious or permanent injury. See, for example, *Pana-Borrero v. Estremeda*, 375 F.3d 7 (1st Cir. 2004); *Braun v. Baldwin*, 346 F.3d 761 (7th Cir. 2003); *Crumley v. City of St. Paul*, 324 F.3d 1003, (8th Cir. 2003); *Bastien v. Goddard*, 279 F.3d 10, (1st Cir. 2003); *Kakla v. Hujlm*, 310 F.3d 1046 (8th Cir. 2002); *Burchett v. Kiefer*, 310 F.2d 937, 944-45 (6th Cir. 2002); *Rodriguez v. Farrell*, 280 F.3d 1341 (11th Cir. 2002). The only conflict found in the cases presented by Tate is that some Circuits require a serious or permanent handcuffing injury before finding a Fourth Amendment violation; however, that is not a relevant consideration in the instant matter because Kopec did suffer such a grievous injury.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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